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Māori Land Law in Aotearoa New Zealand

Recognizing Land as tāonga tuku iho

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Introduction

During the nineteenth century, the New Zealand Government used a series of legislative mechanisms to facilitate the alienation of land from Māori (Boast, 2008). The Māori customary regime was seriously altered, and land titles were individualized to facilitate land transactions and settlement. The conversion from a customary regime into a fee simple (or freehold title system) revealed difficulties in reconciling the "new" system with the customary regime. Under the customary regime, land is held in accordance with *tikanga* Māori (Māori law, values, and practices)[1] and represents a source of identity (Durie, 1998), while under the "new" Crown land tenure system, land was and is today seen in terms of market potential and commercial interests.

The freehold title system resulted in the alienation of the land, undermined tribal authority, and imposed complex ownership arrangements (Belgrave et al., 2004). Indeed, the *Land Transfer Act* 1870 introduced the Torrens system for land titles, where those with indefeasible title were guaranteed full ownership to the land, thus extinguishing customary title. As Diamond and Sanderson argue in this book, the Torrens system created the administrative tool for dispossession with ongoing ramifications for land rights. The freehold system also created two categories of private land: general land and Māori freehold land. General land, under

This chapter is based, in part, on Sandra Cortés Acosta's PhD dissertation at Te Herenga Waka Victoria University of Wellington.

[1] *Tikanga* is not equivalent to customary law. *Tikanga* operates in all aspects of Māori life and comprises cultural, spiritual, and practical aspects that are beyond a set of rules, which apply to distinct areas of social life or a strictly legal domain (Jones, 2014).

https://doi.org/10.1017/9781009521581.011 Published online by Cambridge University Press

private ownership, is not subject to the distinct statutory regime of Māori freehold land and can be owned by Māori or any other New Zealander. Māori freehold land is usually collectively held and today is regulated by the *Te Ture Whenua Māori/Māori Land Act* 1993 (TTWM). The status of Māori freehold land indicates that the land title is ultimately derived from a determination by the Native/Māori Land Court based on customary regime and ancestral connections, and has been converted by the Court to a freehold title.

The TTWM has roots in the relationship of Māori with the land, the transition of customary land to an individual title, and various attempts to address challenges associated with fragmented titles and multiple owners. It is estimated that Māori freehold land is about 5 percent of Aotearoa New Zealand's 26.8 million hectares of total land area (Harmsworth, 2018).[2]

For Māori, attitudes toward land are multidimensional and continue to be deeply influenced by *mātauranga* Māori (Māori knowledge systems) (Harmsworth & Awatere, 2013; Mead, 2016; Marsden, 2003). The political and legal processes preceding the enactment of TTWM illustrated that Māori saw a recognition of land as a basis of identity (Durie, 1999; Mead, 2016). Additionally, the pressure to develop the land with commercial interests motivated a "new role" for the land as a sustainable economic base for Māori. Therefore, the TTWM focuses on retention alongside utilization, and recognizes land as *tāonga tuku iho* – a treasure that connects current generations with their ancestors and future generations. Safeguarding this land is critical moving forward.

Te whenua Te iwi, the Land and the People

While many aspects of Māori culture are integrated into mainstream culture in Aotearoa New Zealand, it remains distinct in several ways. For example, Māori rights and obligations to land are primarily founded upon ancestral connection to the land over successive generations. Maintaining that connection through use of the land and participation in the community is also important. The resolution of disputes about land and the assertion of rights in relation to land are framed by a

[2] The total area of Māori freehold land differs by source. Te Puni Kōkiri (2014) estimates that Māori freehold land varies between 1.43 million and 1.77 million hectares, while Kingi (2008) suggests that Māori freehold land is about 5.6 percent of New Zealand's total land area of 26.8 million hectares.

distinctive worldview. According to this worldview, both rights and duties are held in accordance with *tikanga* Māori, which Jones (2014) articulates is a Māori values-based system that "[d]escribes the right or correct way of doing things within Māori society. It is a system comprising practices, principles, processes and procedures, and traditional knowledge. It encompasses Māori law but also includes ritual, customs, spiritual and socio-political dimensions that go well beyond the legal domain" (p. 189).

Before European arrival in Aotearoa New Zealand and the signing of *Te Tiriti o Waitangi* (the Treaty of Waitangi), Māori association with the land was shaped by the belief that people belong to the land rather than owning it (Mead, 2016). For Māori, the relationship between people and land comes from an ancestral connection based on customary practices, protocols, and values. Land is a source of identity for Māori, as they see themselves as *tangata whenua* or the people of the land. *Whenua* is the word for land in *Te Reo Māori* (Māori language). As Mead (2016) states, "whenua carries a wide range of meanings. Whenua, as placenta, sustains life and the connection between the foetus and the placenta is through the umbilical cord. This fact of life is a metaphor for whenua, as land, and is the basis for the high value placed on land" (p. 285).

Under a Māori customary regime, rights of occupation and use were determined collectively by Māori tribal authorities, subdivided into *whānau*, *hapū* and *iwi* (family, sub-tribe and tribe). As observed by Durie (1987), "in the beginning land was not something that could be owned or traded. Maoris did not seek to own or possess anything, but to belong. One belonged to a family that belonged to a hapū that belonged to a tribe. One did not own land. One belonged to the land" (p. 78).

The Māori customary regime and association to land involved collectively held rights of occupation, access, and use over land without claiming ownership (Durie, 1998; Kingi, 2008; Bennion, 2009). The rights to land were evidenced through occupation by establishing *kāinga* (settlement) and cultivation, but also through the use of resources for the sustainability and survival of the settlement. Association with the land was predominantly recognized by an ancestral connection based on historical occupation (*ahikāroa*) or spiritual connection with the land – for example, birth or death of their ancestors. Given this ancestral connection with a specific land or area, the association with the land could be retained even when rights over the land were lost (Waitangi Tribunal, 2003).

Although the Crown has altered the customary regime, attitudes toward land are still profoundly influenced by *mātauranga* Māori

(Māori knowledge systems) (Harmsworth & Awatere, 2013; Mead, 2016; Marsden, 2003). *Mātauranga* Māori provides the basis for *Te Ao Māori* (Māori world view) and Māori values through which Māori experience and interpret their environment and determine their attitudes toward land (Harmsworth & Awatere, 2013; Marsden, 2003; Mead, 2016; Phillips & Hulme, 1987). Guiding land use decisions were principles of interdependency and intergenerational equity. Interdependency is a reciprocal relationship between people and the land, and comprises *manaaki whenua* (caring for the land) and *manaaki tangata* (caring for people) (Harmsworth & Awatere, 2013). Intergenerational equity can be seen as a concern for resource sustainability and protection of the land across generations. With these decision drivers in place, land is passed from one generation to the next in as good a condition as it was received.

Te Tiriti o Waitangi

Land tenure and the mechanisms for recognizing *tikanga*-based or Māori customary forms of title were specific matters addressed in *Te Tiriti o Waitangi*/the Treaty of Waitangi, signed in 1840 by Māori leaders and the British Crown. Te Tiriti is recognized as a foundational constitutional document, which established the formal relationship between Māori and British spheres of authority. It was signed in the context of a system of *tikanga* that provided for a range of intersecting rights and duties in relation to land and the natural environment. Te Tiriti is central to any discussion of Māori land.

The essential bargain set out in Te Tiriti was that the British Crown could exercise governmental authority, at least over British subjects in Aotearoa, in exchange for the protection of Māori authority. Te Tiriti contains specific guarantees for Māori to retain the undisturbed possession of their lands, unless and until Māori wished to sell any such land. The Māori text of Te Tiriti frames this as a broad guarantee of authority over all things that are highly valued to Māori, whereas the English text uses the specific language of property rights in relation to resources such as land, forests, and fisheries.

Partly on the basis of Te Tiriti and partly on the basis of "discovery," the British Crown asserted sovereignty over Aotearoa New Zealand, notwithstanding the fact that exclusive Crown sovereignty would have been entirely inconsistent with the guarantees of Māori authority contained in Te Tiriti.

Te Tiriti is now recognized as a foundational component of Aotearoa New Zealand's unwritten constitution. In 1975, the Waitangi Tribunal was established to hear claims based on "the principles of the Treaty" and has subsequently published a large body of reports addressing both historical and contemporary breaches of Treaty principles and making recommendations to the government of the day to redress well-founded claims and to prevent future breaches of Treaty principles. Many of these claims relate specifically to land alienation that has occurred in breach of Te Tiriti.

However, without formal constitutional protection, legally enforceable rights under Te Tiriti are limited. Aotearoa New Zealand's unitary and unicameral system of government centralizes power in the Parliament, which, in turn, has historically been dominated by the Executive branch, at least until the introduction of proportional representation in 1996. Settlements of historical Treaty claims are negotiated political agreements, rather than a recognition of rights. Both the Māori Land Court and the ordinary courts have a limited statutory jurisdiction in relation to Māori rights to land. As a consequence, Māori have been able to use Te Tiriti more effectively as a political instrument, rather than the source of legally enforceable rights to land.

An Era of Land Dispossession, Alienation and Title Individualization

From the 1860s onwards, the Crown drastically altered the Māori customary regime to facilitate the trading of the land for European settlement purposes. The Torrens system, an ownership arrangement with individual and indefeasible title-recording owners and shareholders, replaced the customary regime. Though some land blocks remained under Māori ownership (today known as Māori freehold land), this individualization undermined tribal authority and affected the social cohesion between *whānau*, *hapū*, and *iwi*.

The Crown enforced a range of legal mechanisms to dispossess and alienate land from Māori and individualize the property rights of the land without reference to the wider community. The main mechanisms used were land confiscation, Crown land purchases and alienation facilitated by the Native Land Court (Boast, 2008; Bennion, 2009).[3] The Native Land Court was established to stipulate who held the rights on customary

[3] Land confiscation was a coercive expropriation of customary land by statutory fiat and was a way to individualize the land that was under Māori customary tenure and make it recognizable under English Common Law (Boast, 2008).

land and had the authority to convert customary lands into fee simple.[4] Land was surveyed and divided up into blocks of varying sizes, and lists of "owners" were drawn up and allocated with shares (Mead, 2016). As a result, two parallel ownership arrangements took place: European land (today known as general land) and Māori freehold land. Since then, Māori freehold land has evolved into a complex multiple ownership structure with fragmented titles and multiple interests (Kingi, 2008; Waitangi Tribunal, 2008).[5]

The Current Māori Land Law Framework

During the twentieth century, the Crown was deeply involved in the administration and management of Māori freehold land with commercial purposes in mind. Before the Second World War, policies regarding Māori land development relied on a process of amalgamation and incorporation as an attempt to consolidate land blocks into economic units and simplify ownership (Belgrave et al., 2004).[6] After the mid-twentieth century, the *Māori Affairs Act* 1953 and its amendments led to an era of title reforms and schemes for administering Māori freehold land. Furthermore, policies were mainly implemented through the Māori Land Court (formerly the Native Land Court), the Department of the Māori Affairs,[7] and the Māori

[4] To claim rights over customary land, the Native Land Court used three *take* (foundations), *take tuku* (gift), *take ōhāki* (deathbed deposition), and *take raupatu* (conquest) (Sinclair, 1977).

[5] The legislation in the 1860s made it mandatory that all descendants from the former "owners" had an equal right to the land. For that reason, land titles allocated to some Māori owners were handed down through successive generations. With an additional situation, descendants now have an absolute right of ownership to the land interest of both parents. Register owners in the last few generations have then exponentially increased (Kingi, 2008).

[6] The Incorporations system was established under the *Native Land Court Act* 1894. Given that this system facilitated the amalgamation of land titles into groups, Sir Āpirana Ngata recognized incorporations as an attempt to revert the individualization of the land titles and emulate the former regime of collective ownership, with one important difference: the administration of the land was centralized in a group of committee members (Durie, 1999; Kingi, 2008).

[7] Although the roots for the Department of Māori Affairs can be traced back to former agencies created in the 1800s, it was formally established in 1947 (Fleras & Spoonley, 1999). This government body was in charge of implementing and conducting initiatives regarding Māori policy and land development, vocational training, welfare, and housing (Durie, 1999). Initially, it was constituted under the philosophy of supporting tribal leaders and encouraging collective strategies with tribal aspirations for developing their land (Fleras & Spoonley, 1999).

Trustee[8] (Belgrave et al., 2004; Fleras & Spoonley, 1999; Waitangi Tribunal, 2016).

The *Māori Affairs Act* 1953 introduced a leasing regime, set out reforms for the operation of Māori incorporations, and created a system of trusts, known as 438 trusts.[9] This Act also conferred the Māori Land Court with special powers to (1) appoint the Māori trustee as an agent to dispose of unproductive land; (2) allow others apart from landowners to develop a specific Māori land block, when it was proved that it was fertile and was not being put to "good use"; and (3) establish an incorporation over any block of Māori freehold land with three or more owners under the intent to occupy and use the land for any agricultural, pastoral, or timber activities. However, the implementation of the reforms introduced in the *Māori Affairs Act* 1953 and its amendments were not an easy task for the Crown. By the end of the twentieth century, Māori opposition was vocal and well organized, demanding the return of unjustly alienated land and the retention of land in Māori ownership according to *tikanga* Māori. This led to the current Māori land law framework, regulated by the TTWM.

The TTWM explicitly references *Te Tiriti o Waitangi* and recognizes that *whenua* (land) is a *taonga tuku iho* or a treasure for Māori people that connects current generations with their ancestors and those to come. The TTWM recognizes that Māori cultural values influence Māori behavior and relationships with land, driving decisions relating to collaboration, investment, diversification, and management of Māori freehold land. The TTWM promotes the retention of land in the hands of its owners, their *whānau* (extended family) and their *hapū* (sub-tribe). It also facilitates the use, development and control of Māori freehold

[8] The position of the Māori Trustee was formerly established at the beginning of the twentieth century under the *Native Trustee Act* 1920. It was originally created to provide support in concerns such as the management and productivity of Māori land. The Māori Trustee was established under the *Māori Trustee Act* 1953 and later replaced by the *Māori Trustee Amendment Act* 2009. According to the more recent Act, the Māori Trustee has the capacity and power to carry on or undertake any business or activity or to enter into any transaction.

[9] Incorporations were provided with special provisions for the sale and purchase of Māori freehold land within the incorporation. Conversely, the 438 trusts allowed land to be vested in trustees, often the Māori Trustee, who had the power to administer the trust property for the benefit of Māori or their descendants (Waitangi Tribunal, 2016). The introduction of 438 trusts of the *Māori Affairs Act* 1953 were the basis for the creation of the other statutory trusts in the *Te Ture Whenua Māori Act* 1993. Today, 438 trusts are known as Ahu Whenua trusts.

land, recognizing several different land uses, not only commercial use. To meet these objectives, the TTWM sets strong rules that restrict the alienation of Māori freehold land, including sales or lease (Durie, 1998).

Moreover, to administer and facilitate decisions, the TTWM provides a scheme for the Māori land governance structures. These structures have become an important body to overcome absentee ownership and title fragmentation. They have been used as a vehicle to try to revert to collective ownership, but they cannot be easily compared with any "institutions" observed under the customary regime (Kingi, 2008).

Foreshore and Seabed

Aotearoa New Zealand has not experienced the same kind of landmark Aboriginal title cases that jurisdictions such as Australia and Canada saw in the latter part of the twentieth century (see the chapters on Australia and Canada in this book).[10] The primary reason for this is that the Native Land Court was extremely effective in its task of converting customary title into freehold title. As discussed above, Māori lands and title have been regulated by a comprehensive statutory regime since the 1860s. Although the current legislation, *Te Ture Whenua Māori Act* 1993, maintains the Māori Land Court's jurisdiction to identify customary title, it is estimated that very few, if any, areas of land remain that are held according to customary title. Most Māori land is now held as Māori freehold land. However, in recent years, the nature of potential customary title in the foreshore and seabed has been the subject of litigation, legislation, and significant political debate.[11]

The nature of Māori rights in the foreshore and seabed became an issue of significant public controversy following the Court of Appeal's 2003 decision in *Ngāti Apa v Attorney-General*. In that case, the Court of Appeal (at the time, the highest appellate court based in Aotearoa, with only the United Kingdom's Privy Council superior in hierarchy) recognized that areas of the foreshore and seabed may still be held under Māori customary title. The *Ngāti Apa* decision did not address any specific claims of customary title, so the Court did not make any findings of customary title existing in any particular area of the foreshore. Rather,

[10] See, for example, *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.

[11] See *Ngāti Apa*; *Foreshore and Seabed Act* 2004; *Marine and Coastal Area (Takutai Moana) Act* 2011; and *Edwards*.

the Court determined that such title could theoretically exist. That is, a Native Land Court determination of customary title in coastal land, and conversion of that title to freehold title, did not imply any determination about title to the adjacent foreshore. What is more, the Court held that there was no general legislative bar to the existence of Māori customary title to the foreshore. The Court noted that it would not necessarily be easy to prove continuing customary title, and it may be that very few areas of customary title in the foreshore still exist, but, nevertheless, such rights and title could potentially be proven. *Ngāti Apa* overruled a previous Court of Appeal decision, *In Re the Ninety-Mile Beach*,[12] and, in doing so, upended existing assumptions of title in the foreshore.

The Court of Appeal's decision sparked an intense political debate. Within days, the then Labour-led government announced that it intended to introduce legislation removing the court's ability to recognize either common law Aboriginal title or customary title under TTWM for the foreshore and seabed. The government's proposals were highly controversial, with many Māori viewing them as a confiscation of property rights.[13] The government's intention was to provide a more limited legislative scheme for the recognition of Māori customary rights in the foreshore and seabed than would have been provided by the recognition of common law Aboriginal title or by a Māori Land Court finding of customary title. The central plank of the legislation provided that title to the foreshore and seabed would be held by the Crown. Māori would be able to apply for the recognition of customary rights in these areas, but not exclusive title.

Prior to legislation being introduced, the Waitangi Tribunal agreed to urgently hear claims alleging that the Crown's proposals were inconsistent with the principles of the Treaty of Waitangi. The Tribunal found the Crown's proposed policy was in breach of Treaty principles in several ways. First, the Tribunal determined that, even if no specific customary title to the foreshore had at that point been recognized, the removal of the ability to test such claims of title in the courts would be tantamount to the removal of a property right. Second, the Tribunal noted that the Crown already had the ability to compulsorily purchase land under public works legislation, but the proposed policy would remove property

[12] In Re the Ninety-Mile Beach [1963] NZLR 461.

[13] A Māori Cabinet Minister, Tariana Turia, resigned over this issue and went on to establish the Māori Party, whose MPs held ministerial portfolios in subsequent administrations and were influential in repealing the *Foreshore and Seabed Act*.

rights to the foreshore and seabed without compensation. Third, because the proposals would exempt any areas of the foreshore already explicitly covered by a certificate of title, only Māori property rights would be abrogated. The Tribunal had many other concerns with both the substance of the proposals and the process by which they were developed and recommended that the Crown engage in a longer conversation with Māori before progressing the proposed policy. However, the government was not bound to follow those recommendations, and the *Foreshore and Seabed Act* was enacted in 2004.

Foreshore and Seabed Act

The *Foreshore and Seabed Act* 2004 provided for two different types of recognition of customary rights. "Territorial customary rights" could be recognized where a group could prove they had exclusive use and occupation of an area of the public foreshore and seabed without substantial interruption since 1840, and that the group also had continuous title to contiguous land. Any Māori kin group – a *whānau*, *hapū*, or *iwi* – was able to make a claim for territorial customary rights under the Act. A successful application for the recognition of territorial customary rights could lead to one of two outcomes. The successful applicant group could apply to the High Court for an order referring the matter to the attorney-general and minister of Māori Affairs to negotiate appropriate redress. Alternatively, the applicant may apply for an order establishing a foreshore and seabed reserve.

The other customary rights recognition mechanism established by the *Foreshore and Seabed Act* is a "customary rights order." Both the High Court and the Māori Land Court had jurisdiction to determine applications for customary rights orders under the 2004 Act. Customary rights orders provide recognition of specific customary practices. Māori groups could apply for a customary rights order in relation to an activity or practice that meets the following criteria:[14]

- the activity or practice is, and has been since 1840, integral to *tikanga* Māori; and
- has been carried on, exercised, or followed in accordance with *tikanga* Māori in a substantially uninterrupted manner since 1840, in the area of the public foreshore and seabed specified in the application; and

[14] s 50, *Foreshore and Seabed Act* 2004.

- continues to be carried on, exercised or followed in the same area of the public foreshore and seabed in accordance with *tikanga* Māori; and
- is not prohibited by any enactment or rule of law; and
- the right to carry on, exercise or follow the activity, use, or practice has not been extinguished as a matter of law.

As noted above, the *Foreshore and Seabed Act* was highly contentious. Legal scholars noted that the statutory tests in the Act drew on the most restrictive aspects of tests for Aboriginal rights and native title in Canada and Australia (Dorsett, 2007; McNeil, 2007). The general election in 2008 ushered in a new government, with the National Party as the majority party in government. In a confidence and supply agreement with the Māori Party, the National Party agreed to review the *Foreshore and Seabed Act*. This review eventually led to the repeal of the *Foreshore and Seabed Act* and the enactment of its replacement, the *Marine and Coastal Area (Takutai Moana) Act* 2011.

The *Marine and Coastal Area Act* maintains the same basic structure as the *Foreshore and Seabed Act*. "Territorial customary rights" is replaced by "customary marine title" and "customary rights orders" and replaced by "protected customary rights." The tests for recognition were also adjusted slightly. Customary marine title still requires exclusive use and occupation since 1840 without substantial interruption, but now recognizes that the specified area is to be held in accordance with *tikanga* and no longer requires continuous title to contiguous land. A protected customary right is defined as a right that:

(a) has been exercised since 1840; and
(b) continues to be exercised in a particular part of the common marine and coastal area in accordance with *tikanga* by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and
(c) is not extinguished as a matter of law.

These minor changes mean that the tests for rights recognition under the *Marine and Coastal Area Act* should be able to be met more easily by applicant groups. Another significant change from the *Foreshore and Seabed Act* is that rather than title over the foreshore being held by the Crown, under the *Marine and Coastal Area Act*, this space, now described as the common marine and coastal area, cannot be owned by anyone. While this change has little practical impact, as the Crown continues to exercise many of the functions of a landowner, it is,

nonetheless, a symbolically important change. Although the *Marine and Coastal Area Act* is generally viewed as being a vast improvement on the *Foreshore and Seabed Act*, the new legislation maintains some of the most problematic aspects of the previous legislation. The fundamental basis of the Act is that it prevents Māori from being awarded exclusive title to areas of the foreshore and replaces that possibility with a statutory scheme of lesser rights without compensation. Furthermore, the 2011 Act is still discriminatory, continuing the exemption of existing, privately held title from the new regime. At the time of writing, only three High Court decisions have addressed the substantive recognition of customary rights in the marine and coastal area. These decisions have recognized customary marine titles and protected customary rights in areas on the Titi Islands,[15] in the eastern Bay of Plenty,[16] and northern Hawke's Bay.[17]

Any applications under the *Marine and Coastal Area Act* were required to have been submitted by April 2017. The first substantive decision in relation to a contested application for customary marine title was *Re Edwards (Te Whakatohea (No.2))*.[18] This case involved multiple parties and a lengthy hearing covering complex evidence and legal arguments, and the judgment is, accordingly, substantial and covers a range of issues in careful detail. For current purposes it is sufficient to note that the Court placed significant weight on the requirement that the specified area of the common marine and coastal area be "held in accordance with tikanga" as part of the test for customary marine title. In particular, the Court took the view that there was no reason why "held" should import common law concepts of how property is held. Rather, "according to tikanga" suggests that Māori law ought to inform the content of this part of the test. The Court wrote, "[h]olding an area of the takutai moana [foreshore] in accordance with tikanga is something different to being the proprietor of that area."[19] Consequently, other parts of the test for customary marine title, such as what would constitute "exclusive use and occupation" and "substantial interruption," will be determined by Māori law and may be different to how such elements might be considered according to English property law. While the

[15] *Re Tipene* [2016] NZHC 3199.
[16] *Re Edwards (Te Whakatohea (No.2))* [2021] NZHC 1025.
[17] *Re Ngāti Pāhauwera* [2021] NZHC 3599.
[18] *Re Edwards (Te Whakatohea (No.2))* [2021] NZHC 1025.
[19] *Edwards*, at [130].

recognition of customary rights in *Edwards* is significant, the potential benefit to the applicants of the recognition of customary marine title and protected customary rights is limited. The statutory rights that will accrue to applicants are rights to participate in conservation processes and enhanced rights in planning and consenting processes under the *Resource Management Act* 1991. Customary rights holders will enjoy greater ability to influence these processes under the statute but this is far short of a recognition of common law Aboriginal title, which the Court of Appeal determined in *Ngāti Apa* could have been available to Māori prior to the enactment of the *Foreshore and Seabed Act* 2004.

Treaty Settlements

One further area that has a bearing on the nature of Māori land rights is the settlement of historical claims based on Crown breaches of *Te Tiriti o Waitangi*. Since the early 1990s, the Crown has been engaged in a systematic programme of direct negotiation with Māori groups to settle historical claims. These settlements often involve redress related to land, including the return of land acquired by the Crown in breach of its Tiriti obligations. Where title to land is returned, this is usually returned as general land and, while forming an important part of treaty settlements, does not raise any novel or distinctive legal issues.[20]

However, there are many forms of redress relating to land that are used in treaty settlements, including various models of co-governance or co-management of specific sites. These models may include partnership arrangements between settling groups and the Crown and collective management by multiple Māori groupings. For example, the Tāmaki Makaurau Collective Settlement vested a number of volcanic cones in the Auckland area in a joint governance body made up of six representatives appointed by thirteen Māori groups included in the settlement and six representatives from Auckland Council (the relevant municipal body). These sites retain the status of public reserves, with the joint governance body now overseeing the management and administration of these sites.

In relation to the lands which formerly comprised Te Urewera National Park in the central North Island (now simply "Te Urewera"),

[20] Te Arawhiti – The Office of Māori Crown Relations provides a quarterly update of progress in Treaty settlements. See www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/quarterly-reports/.

the joint governance arrangements are underpinned by a recognition of the legal personality of the land itself. *Te Urewera Act* 2014 provides that Te Urewera is, itself, a legal entity with "all the rights, powers, duties, and liabilities of a legal person."[21] Te Urewera is now managed by a joint governance board. Six members of the board are appointed by Tūhoe (the settling group), and three members are appointed by the Crown. The legislation requires that the board must consider and give expression to customary values and law in the management of Te Urewera. The recognition of legal personality of a landscape feature has also been used in the settlement of claims in relation to Te Awa Tupua (formerly, the Whanganui River)[22] and Ngā Maunga o Taranaki, Pouākai me Kaitake (Mount Taranaki, Pouākai, and the Kaitake Ranges).[23]

Pathways toward Land Rights

With no formal constitutional protection, recognition of Māori land rights remains limited and precarious. The enactment of the *Foreshore and Seabed Act* 2004 illustrates that the New Zealand Government continues, even into the twenty-first century, to be willing to expropriate Māori property rights and limit the jurisdiction of the courts to recognize Māori rights to land.

Any land that falls within the statutory category of "Māori land" is regulated by the Māori Land Court and its empowering statute, *Te Ture Whenua Māori Act* 1993. That statute has been effective at slowing the alienation of Māori land but has done so by placing significant restrictions on the rights of Māori landowners. The statute is primarily an attempt to ameliorate the problems created by earlier legislation which was designed to facilitate the sale of Māori land.

Negotiated agreements aimed at settling historical breaches of the Treaty of Waitangi have resulted in some land being returned to Māori ownership. However, the amount of land made available in these settlements is tiny compared to the scale of historical land loss. The Waitangi Tribunal is prohibited from recommending the return of private land to Māori and private land is excluded from Treaty settlement agreements. Only surplus Crown land is available to be used in Treaty settlements,

[21] Te Urewera Act 2014, s 11 (1).
[22] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
[23] Te Anga Pūtakerongo (20 Dec 2017).

which means that in practice very little land is returned by way of Treaty settlements.

Treaty settlements have, however, provided innovative mechanisms for co-governance and opportunities for Māori to participate in conservation or resource management processes. Aside from the small percentage of Aotearoa New Zealand's land area that is retained as Māori land under TTWM, this is perhaps the area in which Māori have had most success in securing an ability to influence land management. Similar participation rights are likely to result in the coming years from applications made under the *Marine and Coastal Area (Takutai Moana) Act* 2011.

Conclusion

Prior to the assertion of British sovereignty in Aotearoa New Zealand, Māori land rights were recognized and governed by *tikanga* Māori (Māori law, values, and practices). Today, however, Māori land is primarily regulated by TTWM. The state legal system has recognized Māori land rights via a legislative scheme ever since the enactment of the Native Land Acts in the 1860s. Those statutes were intended to recognize the customary owners of land and to convert the customary title into freehold title. TTWM now aims to support the retention of Māori freehold land in the hands of Māori and to promote their utilization of that land. Although filtered through the framework of the legislation, *tikanga* Māori remains relevant to decisions about land use, the implementation of the legislation, and the operation of the Māori Land Court. Recent developments in relation to the foreshore and seabed and the settlement of historical treaty claims further illustrate the New Zealand Government's preference to give effect to Māori land rights via legislation. This legislative approach has generally tended to narrow the scope of Māori land rights and has ensured that the recognition of Māori land rights is subject to the political whims of the government of the day. Although *tikanga* Māori has always been a key thread of state law recognition of Māori land rights, to a greater or lesser degree recent developments show a state legal system that is still struggling to give appropriate effect to land rights sourced in *tikanga*. Without constitutional protection and a land rights framework aimed at strengthening Māori land title in ways that meet Māori needs, the promise of land as *tāonga tuku iho* remains elusive.

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